1989

Daniel English, as Personal Representative of the Estate of Robert English v. Albert Kienke : Brief of Appellant

Utah Supreme Court

Fred R. Silvester, Charles P. Sampson; Suitter, Axland, Armstrong & Hanson; attorneys for appellant.
Aaron Alma Nelson; Hanson, Nelson, Chipman & Quigley; Allan L. Larson; Snow, Christensen & Martineau; counsel for respondents.

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

DANIEL ENGLISH, as Personal Representative of the Estate of ROBERT ENGLISH, Plaintiff/Appellant, v. ALBERT KIENKE, Defendant/Respondent.	)	Case No. 890281 Priority No. 13(b)

BRIEF OF APPELLANT
In Response to an Order of the Utah Supreme Court
Granting Appellant's Petition for Writ of Certiorari

APPEAL FROM A JUDGMENT OF THE UTAH COURT OF APPEALS
Date of Final Judgment - June 2, 1989
Case No. 880236-CA

FRED R. SILVESTER, Esq. (#3862)
CHARLES P. SAMPSON, Esq. (#4658)
CLAUDIA F. BERRY, Esq. (#5037)
SUITTER AXLAND ARMSTRONG & HANSON
Counsel for Appellant
700 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101-1480
Telephone: 801/532-7300

AARON ALMA NELSON, Esq. (#2379)
HANSON, NELSON, CHIPMAN & QUIGLEY
Counsel for Respondent
200 South Main Street, Suite 1300
Salt Lake City, Utah 84101

ALLAN L. LARSON, Esq. (#1896)
SNOW, CHRISTENSEN & MARTINEAU
Co-Counsel for Respondent
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
JURISDICTION	1
STATEMENT OF ISSUES	2
DETERMINATIVE STATUTE	2
STATEMENT OF THE CASE	3
A. Nature of the Case	3
B. Course of Proceedings	4
C. Statement of Relevant Facts	6
SUMMARY OF ARGUMENTS	9
ARGUMENT	8
I. THE COURT OF APPEALS ERRED IN HOLDING THAT NO GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING WHETHER THE DEFENDANT, KIENKE, BREACHED HIS DUTY AS LANDLORD TO ENGLISH	10
A. The Defendant, Kienke, Owed His Tenant, Robert English, a Duty of Care Irrespective of Whether Robert English Was Negligent	11
B. Kienke, As Property Owner, Breached His Duty to English by Failing to Repair an Unreasonably Dangerous Condition or by Failing to Adequately Warn English of the Condition and Risk Involved	14
II. THE COURT OF APPEALS ERRED IN HOLDING THAT IT NEED NOT DECIDE THE ISSUE OF WHETHER THE DEFENDANT WAS THE STATUTORY EMPLOYER OF ENGLISH SINCE THE COURT HAD ALREADY CONCLUDED THAT ENGLISH'S OWN NEGLIGENCE CAUSED HIS DEATH	20

TABLE OF CONTENTS
(Continued)

Page

A. The Defendant, Albert Kienke, was the Statutory Employer of Robert English. 22

B. Because Kienke Was English's Employer For Purposes of Utah's Worker's Compensation Act, All Remaining Provisions of that Act Are Applicable to This Action. 27

CONCLUSION. 29

APPENDIX A

Utah Code Ann. § 35-1-42

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

A. **Statutes**

Utah Code Ann. § 35-1-42 . . . . . .2, 4, 9, 22, 27

Utah Code Ann. § 35-1-57. . . . . 4, 28

Utah Code Ann. § 35-1-56. 9

Utah Code Ann. § 35-1-46. 27

Utah Code Ann. § 78-27-37(2) (1987) 11

B. **Decisions**

Adamson v. Okland Const. Co., 29 Utah 2d 286, 508 P.2d 805 (1972). 25

Apache Tank Lines, Inc. v. Cheney, 706 P.2d 614 (Utah 1985) 10

Bangerter v. Poulton, 663 P.2d 100 (Utah 1983) . . 9

Bennett v. Industrial Commission of Utah, 726 P.2d 427 (Utah 1986) 21, 23

Dixon v. Stewart, 658 P.2d 591 (Utah 1982) 12, 29

Donahue v. Durfee, 118 U.A.R. 64 (filed, September 28, 1989). 11, 12

Erickson v. Walgreen Drug Co., 120 Utah 31, 232 P.2d 210 (1951) 14, 16

Gregory v. Fourthwest Investments, Ltd., 754 P.2d 89 (Utah App. 1988) 11

Hinds v. Herm Hughes & Sons, Inc., 577 P.2d 561 (Utah 1978) 25

Ingram v. Salt Lake City, 733 P.2d 126 (Utah 1987) 10

TABLE OF AUTHORITIES

Page

Keller v. Holiday Inns, Inc., 105 Idaho 649, 671 P.2d 1112 (Ct. App. 1983) aff'd on other grounds, 107 Idaho 593, 691 P.2d 1208 (Idaho 1984) 13

Kinne v. Industrial Commission, 609 P.2d 926 (Utah 1980). 25

Lee v. Chevron Oil Co., 565 P.2d 1128 (Utah 1977) 25

Moore v. Burton Lumber & Hardware Co., 631 P.2d 865 (Utah 1981) 12

Parker v. Highland Park, Inc., 565 S.W.2d 512 (Texas 1978). 13

Pinter Const. Co. v. Frisby, 678 P.2d 305 (Utah 1984). 21, 25

Rogalski v. Phillips Petroleum Co., 3 Utah 2d 203, 282 P.2d 304 (Utah 1955) 14

Sorenson v. Beers, 585 P.2d 458 (Utah 1978). 10

Stephenson v. Warner, 581 P.2d 567 (Utah 1978) 14, 15

Wagoner v. Waterslide Inc., 744 P.2d 1012 (Utah App. 1987). 14, 16

Wallace v. Kentucky Fried Chicken of Lawton, Okla., Inc., 526 P.2d 504 (Okla. Ct. App. 1974) 21

Wheeler v. Jones, 19 Utah 2d 392, 431 P.2d 985 (Utah 1967) . . . 14

Page

C. **Other Authorities**

Rule 56, Utah Rules of Civil Procedure 9, 20

Restatement (Second) of Torts

§ 342 18
§ 343 . . . . . 14, 16
§ 343A(1) 18
§ 355 15
§ 362 15

Appellant, Daniel English, by and through his counsel of record, Fred R. Silvester, Esq., Charles P. Sampson, Esq., and Claudia F. Berry, Esq., of and for Suitter Axland Armstrong & Hanson, and pursuant to Rules 24 and 42 of the Rules of the Utah Supreme Court, hereby submits the following brief in response to an Order of the Supreme Court of Utah granting Appellant's Petition for Writ of Certiorari.

JURISDICTION

This Court has jurisdiction to decide this appeal pursuant to Title VI of the Rules of the Utah Supreme Court which provides that the Utah Supreme Court, at its discretion, may review a judgment, order or decree of the Court of Appeals upon Petition for Writ of Certiorari.

A Petition for Writ of Certiorari was submitted to this Court on July 3, 1989, for the purpose of requesting that the Court review the opinion of the Utah Court of Appeals, issued on May 10, 1989, denying the plaintiff's appeal from an entry of summary judgment by the District Court and a subsequent order of the Utah Court of Appeals, entered on June 2, 1989, denying the plaintiff's Petition for Rehearing. This Court entered an Order on August 31, 1989, granting the plaintiff's Petition for Writ of Certiorari.

STATEMENT OF ISSUES

The following issues are presented to this Court for review:

1. Did the Utah Court of Appeals err in finding that no disputed issues of fact exist regarding the responsibility of the decedent, Robert English ("decedent" or "English"), for his own death and, therefore, that the defendant, Albert Kienke ("defendant" or "Kienke"), did not breach his duty as landlord?

2. Did the Utah Court of Appeals err in holding that it need not address the issue of whether an employee-employer relationship existed between English and Kienke since the Court had already concluded, as a matter of law, that the tenant, English, had been negligent rather than Kienke and, therefore, that Kienke had not breached his duty as landlord?

DETERMINATIVE STATUTE

This Court's interpretation of the following statute, (Appended to this Brief as Appendix "A"), is pertinent to the determination of the issues presented for review:

Utah Code Ann. § 35-1-42 (1953, as amended).

STATEMENT OF THE CASE

A. Nature of the Case.

This is a wrongful death action brought by Daniel English, as Personal Representative of the Estate of Robert English, alleging negligence on the part of the defendant for (1) his failure as a landlord to make safe or to advise the decedent of the dangerous condition which existed on property owned by the defendant at 1031 Windsor Street, Salt Lake City, Utah, and (2) his failure as an employer to provide a safe work place and to properly instruct his employee, the decedent. On January 4, 1986, while the decedent was repairing the front porch of the residence at 1031 Windsor, the porch roof, approximately 36 inches thick and 15 feet long, fell on decedent causing severe personal injuries which later resulted in his death. At the time of the accident, the decedent was employed by the defendant to provide general labor on the residence located at 1031 Windsor Street. The residence was owned by the defendant.

Plaintiff's Complaint seeks damages from the defendant under two theories of recovery. First, the defendant breached his duty as the owner and landlord of the residence at 1031 Windsor by failing to use reasonable care to discover the dangerous condition which existed at the residence and either correct this condi

tion, or adequately warn the decedent of the dangerous condition

and unreasonable risk which existed at the residence. Second, the defendant breached his duty as an employer by failing to provide a safe place for the decedent to work, by failing to adequately supervise the decedent's work on the residence, by failing to adequately prepare and design the construction project which he initiated on the residence, by failing to properly instruct the decedent and by failing to provide workers compensation insurance. This second theory of recovery turns on the issue of whether the defendant was the decedent's statutory employer under the provisions of Utah's Workers' Compensation Act, Utah Code Ann. § 35-1-42 (1953, as amended). If an employee-employer relationship existed, then the remaining provisions of Utah's Workers' Compensation Act, including section 35-1-57, apply. Under the provisions of Utah Code Ann. § 35-1-57, the fact of the injury itself constitutes a prima facie case of negligence, and the defendant cannot avail himself of the affirmative defenses of assumption of risk or contributory negligence.

B. Course of Proceedings.

On September 14, 1987, the Honorable David S. Young of the Third Judicial District Court of Salt Lake County, State of Utah, entered an Order (Record [hereinafter "R."] pp. 223-24) granting defendant's Motion for Summary Judgment and denying plaintiff's Motion for Partial Summary Judgment. The Order was supported

by the Court's Memorandum Decision dated August 31, 1987 (R. pp. 212-15), in which the Court made numerous factual findings including the following:

1. The defendant had no greater responsibility than the decedent to perceive and discover the dangerous condition and risk created by the porch;

2. The defendant had "no greater responsibility to inform the decedent of the risk than the decedent should have perceived on his own;" and

3. The defendant did not fail in his duty to exercise reasonable care to make the conditions safe.

4. The Court also found that the decedent was an independent contractor and not an employee under the Utah Workers' Compensation Act.

Plaintiff appealed the decision of the District Court and on May 10, 1989, the Utah Court of Appeals issued its Opinion affirming entry of summary judgment in favor of the defendant. Plaintiff filed a timely Petition for Rehearing. The Petition for Rehearing was denied by the Utah Court of Appeals in an Order issued June 2, 1989.

On July 3, 1989, plaintiff petitioned the Utah Supreme Court for a Writ of Certiorari for the purpose of having the Court review the decision of the Court of Appeals. This Court issued an Order on August 31, 1989, granting the Petition of

Certiorari.

C. Statement of Relevant Facts

The following facts are material to the Court's determination of this Appeal:

1. Defendant was in the business of managing, renting, collecting rents and maintaining residential properties which he owned throughout the Salt Lake City area. (R. p. 269: Deposition of Albert Kienke, pp. 4-8.)

2. Defendant, as part of providing rental units, also took responsibility for repair and maintenance, either by personally undertaking the repairs and maintenance or by hiring others to do so on his various rental properties. (R. p. 269: Kienke Deposition, pp. 6-9, 18-19, 21-23, 26-29, 31-34.)

3. Defendant has declared that his business is the business of being a landlord. (R. p. 182 ¶ 3.)

4. One of the residential rental properties owned by the defendant was the residence at 1031 Windsor Street, Salt Lake City, Utah. (R. p. 269: Kienke Deposition, pp. 3-4.)

5. The house needed extensive repairs, including repairs of a hole in the ceiling, holes in the doors, kitchen cabinet doors, carpet and repairs to the front porch. (R. p. 153

¶ 2; p. 269: Kienke Deposition, pp. 38-42.)

6. The posts supporting the lower front porch were rotten and one beam supporting the porch ceiling sagged considerably. These conditions existed before the decedent began repair work on the porch and the defendant was aware of these conditions before the repairs were begun. (R. p. 269: Kienke Deposition, pp. 41, 52-54, 68-71.)

7. In order for the decedent to make repairs to the front porch, the defendant provided a power skill saw, shovel, a tub in which to mix cement and a roof jack. (R. 269: Kienke Deposition, pp. 66-67.)

8. The decedent was repairing the front porch of the defendant's rental unit at 1031 Windsor Street at the time of his death on January 4, 1986. (R. p. 269: Kienke Deposition, pp. 84-86.)

9. The decedent was doing repairs under an express oral contract of hire which provided that in consideration of the decedent's services, the defendant would allow him to live in the rental unit rent-free. (R. p. 154, ¶ 6; p. 269: Kienke Deposition, pp. 45-48.)

10. The decedent, Robert English, had no previous construction experience and was not aware of any danger in reconstructing the porch. (R. p. 269: Kienke Deposition, pp. 92-93.)

11. At all times relevant herein, the defendant re-

tained the right to control and did in fact control the work of the decedent. (R. p. 269: Kienke Deposition, pp. 48-55, 58-63, 67-69, 73-76.)

12. The defendant had been a licensed general contractor in the State of Utah and had several years experience in the construction industry. (R. p. 269: Kienke Deposition, pp. 12-14.) The defendant also took classes in architecture at the University of Utah. (R. p. 269: Kienke Deposition, p. 12.)

13. The defendant did not obtain a building permit for the repair work carried out at 1031 Windsor Street. (R. p. 269: Kienke Deposition, p. 81.)

14. The defendant did not have a policy of workers compensation insurance. (R. p. 269: Kienke Deposition, p. 84.)

SUMMARY OF ARGUMENTS

1. The Court of Appeals erred in upholding the trial court's conclusion that the defendant owed no duty of care to his tenant, English, and, therefore, that the defendant did not breach any duty to discover and warn or correct the unreasonable risk involved in reconstructing the porch on defendant's property. The defendant, by virtue of his status as landowner and his superior knowledge of construction practices, had a duty to apprise the decedent of the dangerous condition and of the gravity of the risk and to adequately instruct him so as to eliminate

that risk. The breach of such duty is an issue of fact for the jury.

2. The Court of Appeals erred in upholding the trial court's conclusion that English was an independent contractor and that the defendant was not his statutory employer. The defendant employed the decedent, retained the right of supervision and control over the work, and the defendant used the decedent in a part or process of the defendant's business as landlord. As an employer, under § 35-1-42, the failure to provide worker's compensation for English allows the plaintiff under Utah Code Ann. § 35-1-56 (1953, as amended) to pursue this civil action and the fact of injury establishes a prima facie case of negligence.

ARGUMENT

Under Rule 56, Utah Rules of Civil Procedure, a court, when determining whether to grant a motion for summary judgment, must construe the facts in favor of the non-moving party. Accordingly, summary judgment should be granted only when it appears that there is no reasonable probability that the non-moving party can prevail. Summary judgment is proper only if the pleadings, depositions, affidavits and admissions submitted in a case show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Bangerter v.

Poulton, 663 P.2d 100 (Utah 1983). In ruling on a motion for summary judgment, the court may consider only facts which are not in dispute. Sorenson v. Beers, 585 P.2d 458 (Utah 1978).

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT NO GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING WHETHER THE DEFENDANT, KIENKE, BREACHED HIS DUTY AS LANDLORD TO ENGLISH.

In this case, the Court of Appeals paid lip service to appropriate case law, e.g., Apache Tank Lines, Inc. v. Cheney, 706 P.2d 614, 615 (Utah 1985), which states that summary judgment should be granted with great caution where negligence is alleged. The Court of Appeals also acknowledged that issues of negligence ordinarily present questions of fact which must be resolved by the fact finder and that summary judgment is reserved for only the most clear-cut negligence cases. Id.; Ingram v. Salt Lake City, 733 P.2d 126, 126 (Utah 1987). (R. p. 273.) Nevertheless, the Court of Appeals upheld the District Court's Order granting summary judgment when obvious issues of material fact existed, the resolution of which were required in order to determine whether the defendant had breached his duty to the decedent as a landowner. In its opinion affirming the trial court's decision granting defendant's Motion for Summary Judgment, the Court of Appeals concluded that the undisputed material facts demonstrated, as a matter of law, that the "decedent created the dangerous

condition that caused his own death." (R. p. 274-75.) Based upon this finding, standing alone, both the District Court and the Court of Appeals concluded as a matter of law, that plaintiff had no claim against the defendant, under either the common law or Utah Workers' Compensation Act and by implication, that Kienke owed the decedent no duty of care.

A. The Defendant, Kienke, Owed His Tenant, Robert English, a Duty of Care Irrespective of Whether Robert English Was Negligent.

Two recent changes in Utah tort law effect the analysis of whether the defendant, Kienke, owed a duty of care to his tenant, Robert English. First, most jurisdictions, including Utah, have abandoned the traditional common law approach which determined a landowner's duty of care in terms of whether the person entering the landowner's land was an invitee, licensee or trespasser. See Gregory v. Fourthwest Investments, Ltd., 754 P.2d 89 (Utah App. 1988). Second, the Utah Legislature enacted a comparative negligence statute, Utah Code Ann. §78-27-37(2) (1987), thereby abandoning the doctrine of contributory negligence. See Donahue v. Durfee, 118 U.A.R. 64 (filed September 28, 1989). The enactment of a comparative negligence system, in turn, has led the Utah courts to reassess corollary doctrines which act as complete bars to recovery on the basis that they are incompatible with a comparative negligence scheme.

In Moore v. Burton Lumber & Hardware Co., 631 P.2d 865 (Utah 1981), for example, this Court expressly renounced the assumption of risk doctrine because of its incompatibility with a comparative negligence system. Similarly, this Court has interpreted Utah's comparative negligence statute to abolish the last clear chance doctrine as a complete bar to recovery. Dixon v. Stewart, 658 P.2d 591 (Utah 1982).

Recently, the Utah Court of Appeals held that the Utah Legislature, by establishing a comparative negligence scheme, "has by necessary implication abolished the open and obvious danger rule as an absolute bar to an injured guest's recovery." Donahue v. Durfee, 118 U.A.R. 64, 66 (filed, September 28, 1989). In Donahue, the plaintiff had filed an action against a landowner, among others, for injuries suffered when he came in contact with an electrical power line. The defendants contended that "they owed no duty to warn Donahue or otherwise protect him from the power line as it constituted an open and obvious danger." Id. at 65. The Utah Court of Appeals rejected this argument and stated:

> We hold that even assuming the power line was an open and obvious danger, Donahue is nonetheless entitled to have the finder of fact compare his negligence, if any, in encountering the power line with any negligence attributable to the defendants in creating or allowing such a dangerous condition to exist.

Id.

A major criticism of the open and obvious danger rule, according to the Utah Court of Appeals, is the fact that the guest's knowledge of an obvious danger should bear only on the reasonableness of the guest's subsequent conduct. What the guest knew or should have known should not affect the landowner's duty of care. Id., citing Keller v. Holiday Inns, Inc., 105 Idaho 649, 671 P.2d 1112, 1117 (Idaho App. 1983), aff'd on other grounds, 107 Idaho 593, 691 P.2d 1208 (Idaho 1984); Parker v. Highland Park, Inc., 565 S.W.2d 512 (Texas 1978). As noted in Keller, the open and obvious danger rule does not distinguish between facts relevant to the landowner's duty of care to guests and facts which establish a defense to liability. Keller v. Holiday Inns, Inc., 671 P.2d at 1117.

Following the line of reasoning set forth in Donahue, plaintiff in the case now before this Court contends that Kienke did, in fact, owe a duty of care to his tenant, Robert English, irrespective of whether Robert English was or was not negligent. Accordingly, even if English were negligent, as both the trial court and Court of Appeals held, that negligence cannot act as a complete bar to recovery under Utah's comparative negligence scheme. Because Kienke owed a duty of care to Robert English, a finder of fact must determine whether Kienke breached his duty of care toward the decedent by comparing Kienke's conduct in allowing the potentially deadly condition of the front porch to

exist with the reasonableness of English's conduct, under all the circumstances, in attempting to repair the front porch.

B. Kienke, As Property Owner, Breached his Duty to English by Failing to Repair an Unreasonably Dangerous Condition or by Failing to Adequately Warn English of the Condition and Risk Involved.

In Stephenson v. Warner, 581 P.2d 567, 568 (Utah 1978), the Utah Supreme Court enunciated a landlord's duty of care toward his tenants:

> It is not to be doubted that a landlord is bound by the usual standard of exercising ordinary prudence and care to see that premises he leases are reasonably safe and suitable for intended uses, nor that under appropriate circumstances he may be held liable for injuries caused by any defects or dangerous conditions which he created, or of which he was aware, and which he should reasonably foresee would expose others to an unreasonable risk of harm.

Whether a defendant has breached the requisite standard of care is generally a question for the fact finder. Id. at 727.

Similarly, the Restatement (Second) of Torts, § 343 states as follows:[1]

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

---

[1] Section 343 is cited as the appropriate standard in Wheeler v. Jones, 19 Utah 2d 392, 431 P.2d 985 (1967); Rogalski v. Phillips Petroleum Co., 3 Utah 2d 203, 282 P.2d 304 (1955); Erickson v. Walgreen Drug Co., 120 Utah 31, 232 P.2d 210 (1951); Wagoner v. Waterslide Inc., 744 P.2d 1012 (Utah App. 1987).

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

The Court of Appeals apparently based its decision--at least in part--upon the fact that the decedent did the hands-on work. Plaintiff never disputed that the decedent did the "hands-on" work on the porch that ultimately collapsed. Nevertheless, neither the cases cited by the Court of Appeals, (see, for example, Stephenson v. Warner, 581 P.2d 567, 568 (Utah 1978)), nor the Restatement (Second) of Torts §§ 355 and 362, supports the conclusion that because the decedent did the hands-on work on the porch, the defendant was absolved of any duty to English.

This is not a situation where a tenant, unbeknownst to the landlord, takes it upon himself to make repairs and dies in the process. Rather, Kienke was actively involved in the repairs. The record below was replete with facts supporting the inference that the defendant, as a trained contractor/landowner who retained the right to control, and did in fact control the work of his tenant, breached his duty to exercise reasonable

care toward the decedent in all circumstances.

Whether the defendant breached his duty to the decedent depends upon the resolution of three disputed issues of material fact:

1. Whether the condition of the front porch presented an unreasonable risk of harm to the decedent;

2. Whether the defendant knew or should have known of the dangerous condition of the front porch and realized that English would not appreciate the risk; and

3. Whether the defendant corrected the condition or properly advised the decedent of the dangerous condition and the magnitude of the risk.

"Whether an unreasonable risk of harm existed is a determination of fact to be made by the jury." Wagoner v. Waterslide Inc., 744 P.2d 1012, 1013 (Utah App. 1987). Similarly, whether the defendant knew or should have known of the dangerous condition of the porch both before and during reconstruction, and whether the defendant corrected the danger or adequately warned the decedent of the risk are also disputed factual issues that should be determined by the fact finder.

This Court, in Erickson v. Walgreen Drug Co., 120 Utah 31, 232 P.2d 210, 212 (1951), analyzing similar factual issues under the standard of care set forth in the Restatement (Second) of Torts § 343, found that these issues must be determined by

the jury. In Erickson, the plaintiff sued Walgreen Drug Company and others for injuries suffered in a fall on a wet terrazzo floor in the entrance way of the drugstore. At issue was whether the defendants "knew or should have known of the propensities of the floor to become slippery when wet and was negligent in failing to warn customers using the entrance way of the hazard involved or to obviate the slippery condition by covering the floor with mats or by the use of other means." Id. at 211. The Court stated that,

> From all of the evidence, we think a jury could reasonably conclude that the appellant knew or should have known of the propensities of its terrazzo entrance way to become slippery when wet and should have realized that because of these propensities, it created an unreasonable risk to business visitors who would not discover the slippery condition and realize the risk involved therein.

Id. at 212.

In this case, the facts construed in the light most favorable to the plaintiff show that the defendant, Kienke, had previously been licensed in the State of Utah as a general contractor and that he had extensive experience in the construction industry. (R. p. 269: Kienke Deposition, pp. 12-14.) In contrast, the decedent had no prior construction experience and had never done structural repair on an existing dwelling--facts of which the defendant was well aware. Thus, the defendant's statements in support of his Motion for Summary Judgment (R.

pp. 153-159) which assumed that English was as subjectively aware of an open and obvious danger as the defendant are unwarranted and clearly the opposite could be inferred. A factual issue exists as to whether the defendant had superior training and knowledge in construction that would enable him to recognize the unreasonable risk of harm created by the dilapidated condition of the porch or by English's methods of reconstructing or, through the exercise of diligence, that would lead him to discover the dangerous state of disrepair of the porch which was not recognized by English. In either situation, the defendant will be held liable under the standard enunciated in the Restatement. Comment c to § 342 states that:

> The possessor's duty also arises it he has had peculiar experience which enables him to realize the risk involved in a condition which he should recognize as unlikely to be appreciated by his licensee as an ordinary man or where he knows that his licensee's experience and intelligence is likely to prevent him from appreciating the risk which is appreciable by a man of ordinary experience and judgment.[2]

Section 343A(1) provides that:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition of the land whose danger is known or obvious to them, unless the possessor should anticipate the

---

[2] Although § 342 relates to the duty owed by a property owner to a licensee, rather than to a business invitee, that section expresses a duty that is equally applicable to both types of visitors.

harm despite such knowledge or obviousness. (Emphasis added.)

Because of the defendant's superior knowledge and because of the lack of knowledge on the part of English, the defendant had a duty to English to give adequate warning of the existing risk and dangerous condition or to make that condition safe. If the risk associated with English's reconstruction of the porch created an unreasonable risk of harm and if that risk was obvious to the defendant because of his construction experience, the defendant had a duty to provide detailed instructions and warnings regarding the methods English should use in reconstructing the porch. This duty arose at the time when he observed the reconstruction of the porch and the methods being used to support the porch. If, however, the dangerous condition of the porch was due to unseen, internal structural deficiencies, English had no way of knowing such conditions existed or how to find such conditions because of his lack of experience in the construction trade. Defendant, on the other hand, as property owner, had a duty to discover such latent defects and warn English of those defects. In addition, defendant, by virtue of his superior training in the construction trade, knew or should have discovered that the hidden structural deficiencies in the dilapidated porch created an unreasonable risk of harm to English. In either case, defendant's duty is firmly established in law and his breach of that duty is an issue of fact to be determined by the trier of

fact. Because under Rule 56, Utah Rules of Civil Procedure, the facts are construed in favor of the non-moving party, the plaintiff is entitled to the inference that English did not appreciate the risk.

Because of the numerous factual issues that exist regarding whether Kienke breached his duty as landowner, this Court should remand this case to the trial court on the basis that genuine issues of material fact exist which must be submitted to the trier of fact for resolution.

II.

THE COURT OF APPEALS ERRED IN HOLDING THAT IT NEED NOT DECIDE THE ISSUE OF WHETHER THE DEFENDANT WAS THE STATUTORY EMPLOYER OF ENGLISH SINCE THE COURT HAD ALREADY CONCLUDED THAT ENGLISH'S OWN NEGLIGENCE CAUSED HIS DEATH.

The Court of Appeals failed to address the propriety of the District Court's ruling that English was an independent contractor and that Kienke was not liable as an employer under the Utah Workers' Compensation Act. (R. p. 269: Kienke Deposition, p. 81.) According to the Court of Appeals, since it was conclusive as a matter of law that the decedent, rather than Kienke, was the negligent party, the court did not need to reach the issue of statutory employment. (R. p. 275.) However, "it is possible for an individual to be an 'independent contractor' in a common law sense, and yet be a 'statutory employer' for

workmen's compensation purposes. . . ." Pinter Construction Co. v. Frisby, 678 P.2d 305, 307 (Utah 1984); See also, Bennett v. Industrial Comm., 726 P.2d 427 (Utah 1986). In addition, the court's conclusion that English was the negligent party was made within the context of a landlord-tenant relationship. Even assuming arguendo, that Kienke did not breach the duty of care he owed as a landlord and that English was negligent--as both the District Court and the Court of Appeals held--it does not follow that the court is thereby relieved of the responsibility of determining whether an employer-employee relationship existed between Kienke and English.

For one, the duty owed by a landlord to a tenant is not the same as the duty owed by an employer to its employee. The employer owes nondelegable duties to furnish (1) a reasonably safe place to work, (2) reasonably safe materials and equipment with which to work, and (3) reasonably safe methods by which to work. Wallace v. Kentucky Fried Chicken of Lawton, Okla., 526 P.2d 504 (Okla. Ct. App. 1974). More importantly, however, the issue of whether an employee-employer relationship exists is separate and distinct from the issue of whether and under what circumstances a landlord may be held liable for injuries sustained by a tenant.

A. The Defendant, Albert Kienke, was the Statutory Employer of Robert English.

Utah's Workers' Compensation Act, Utah Code Ann., § 35-1-42 (1953, as amended) defines "employer" and "statutory employer" for the purpose of determining those situations where the duty to provide workers' compensation to an employee under the Act exists. Section 35-1-42 provides in pertinent part as follows:

> The following shall constitute employers subject to the provisions of this title:
>
> (2) Every person, firm and private corporation, including every public utility, having in service one or more workmen or operatives regularly employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written . . .
>
> Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, such contractor, and all persons employed by him, and all subcontractors under him, and all persons employed by any such subcontractors shall be deemed, within the meaning of this section, employees of such original employer.

The statute thus imposes liability for workers' compensation on any employer who directly hires someone to work in his business. A person who hires a contractor to perform work for him may also qualify as a statutory employer by:

1. Employing the contractor;

2. Retaining the right of supervision or control

over the work of the contractor; and

3. Using the contractor in a part or process of the trade or business of the employer.

In order to determine whether the decedent was an employee of Kienke, the trial court should have applied the criteria set forth in Bennett v. Industrial Commission, 726 P.2d 427 (Utah 1986). The court in Bennett stated that:

> [T]he remedial purpose of the Workmen's Compensation Act supports the conclusion that § 35-1-42(2) should be construed in favor of protecting the employee. . . . The Arizona Supreme Court, in construing an almost identical statutory provision, has stated that it 'is a legislatively created scheme by which conceded nonemployees are deliberately brought within the coverage of the [Workmens' Compensation] Act.' . . . Wisconsin has also recognized the broad scope of its similar statute:
>
> > The entire statutory scheme indicates a desire on the part of the legislature to extend the protection of these laws to those who might not be deemed employees under the legal concepts governing the liability of a master for the tortious acts of his servant.

Id. at 432-33 (citations omitted).

The Bennett court was explicit as to what constitutes supervision or control:

> The requirement in § 35-1-42(2) that the general contractor, as a 'statutory employer,' retain 'supervision or control' over the work of the subcontractor . . . cannot, by definition, be equated with the common law standard for determining whether a person

> is an employee or an independent contractor. . . . the statutory requirement that the general contractor have 'supervision or control' over the work of the subcontractor cannot mean that the subcontractor must also qualify as an employee of the general contractor. That would be at least highly improbable and perhaps impossible by definition. Rather, the term 'supervision or control' requires only that the general contractor retain ultimate control over the project.

Id. at 431-32 (citations omitted).

In order for the lower court to find after construing the facts in the plaintiff's favor that the relationship between the defendant and the decedent, Robert English, was not that of statutory employer-employee, the court had to determine three issues based on undisputed facts:

1. That a contract of employment did not exist;

2. That the defendant retained no right of supervision or control over the work of Robert English; and

3. That Robert English's work on the residence at 1031 Windsor was not a part or process in the trade or business of the defendant.

It is undisputed that the defendant directly hired the decedent, Robert English, to perform remodeling and repair work on the defendant's property at 1031 Windsor Street under an express oral contract of employment. None of the testimony in this case and none of the statements of disputed or undisputed facts contained in defendant's memoranda filed in this case have

ever disputed that a contract of employment existed between Albert Kienke and Robert English. It is also undisputed that the defendant is in the trade or business of being a landlord and that the repair and remodeling of his rental units is a part or process in the trade or business of being a landlord.

Since a contract of employment existed between the defendant and the decedent and since the decedent was engaged in work which constituted a part of the defendant's trade or business, the only criteria upon which the trial court could have ruled that Kienke was not English's statutory employer would have been through a finding that Kienke did not retain the right to exercise control or supervision over English's remodeling and reconstruction activities.

The law in Utah is well settled that an employer need only retain the right to control the work of another in order to be declared the statutory employer of that other individual. The statutory employer need not actually exercise that control. See Adamson v. Okland Construction Company, 29 Utah 2d 286, 508 P.2d 805 (1973); Lee v. Chevron Oil Company, 565 P.2d 1128, 1131 (Utah 1977); Kinne v. Industrial Commission, 609 P.2d 926 (Utah 1980); Pinter Construction Company v. Frisby, 678 P.2d 305 (Utah 1984); Hinds v. Herm Hughes & Sons, Inc., 577 P.2d 561 (Utah 1978). In Hinds v. Herm Hughes, for example, an employee of a subcontractor (Mark Hayes' Masonry) brought an action against

Herm Hughes, the contractor which had contracted with the plaintiff's employer for the latter to construct masonry walls on a construction project. At issue was whether Herm Hughes was the statutory employer of the plaintiff. The court found that a conflict existed in the evidence as to the role played by the construction foreman of Herm Hughes and whether that foreman had the right to control the work done by the plaintiff. The court stated that since the plaintiff's right to recover depended upon his showing that Herm Hughes did not have any right to control the work of the subcontractor's employees, it would be necessary to have a trial of the issue of facts because of the conflict in the evidence on a material issue of fact. The decision makes clear that it is the <u>right</u> to control which is critical to a determination of status as statutory employer and that whether such control exists is a factual issue for which summary judgment may not be proper.

Kienke, in this case, <u>did</u> exercise control. He not only retained the right to supervise and control the work of English, but he actually told English what to do, where to do it and, as admitted by the defendant, in defendant's Memorandum in Support of Motion for Summary Judgment (R. p. 155 ¶¶ 9, 13), he retained the right to approve each project and to control the purse strings over the project. The defendant provided actual approval of work to be done on the project and furnished tools

to carry out the project. (R. pp. 155-56 ¶ 14; R. p. 269: Kienke Deposition, 66-67.). The defendant also gave English instructions regarding the manner in which the porch roof should be braced--a clear indication of control over the methods used (R. p. 87). In addition, Kienke agreed that because of the rotting condition of the porch, the decedent would have to rebuild the porch and he gave directions for bracing the ceiling. (R. p. 269: Kienke Deposition, pp. 73-74.)

The undisputed facts in this case establish that Robert English was an employee and that the defendant was his statutory employer for purposes of Utah's Worker's Compensation Act. This Court, therefore, pursuant to the provisions of Utah Code Ann. § 35-1-42 and in accordance with the guidelines set forth in Bennett, should hold that an employer-employee relationship existed between Kienke and English for purpose of Utah's Workers' Compensation Act.

B. Because Kienke Was English's Employer For Purposes of Utah's Worker's Compensation Act, All Remaining Provisions Of That Act Are Applicable To This Action.

If the defendant in this action is deemed to be a statutory employer under the provisions of Utah Code Ann. § 35-1-42, then Kienke would have been required to secure workers' compensation insurance for English, in accordance with Utah Code Ann. § 35-1-46. It is undisputed that the defendant did not

secure such workers' compensation insurance. (R. p. 269: Kienke Deposition, p. 84.) As a result, Kienke is subject to the penalties set forth in Utah Code Ann. § 35-1-57, which permits an employee to bring a civil action against an employer and provides that "[p]roof of the injury shall constitute prima facie evidence of negligence on the part of the employer and the burden shall be upon the employer to show freedom from negligence resulting in such injury." This statutory scheme allows the fact of the injury or death and any other facts showing unreasonable action on the part of the employer to be submitted to a jury and places the burden on the employer to counter the facts showing negligence. Moreover, "the defendant shall not avail himself of any of the following defenses: . . . the defense of assumption of risk, or the defense of contributory negligence." Utah Code Ann. § 35-1-57. However, neither the District Court nor the Court of Appeals addressed this issue.

The policy created by the Court of Appeals' failure to address the statutory employer issue raised by the plaintiff on appeal will only encourage landlords to hire unskilled maintenance and remodeling people, and assign them projects without adequate training, tools or supervision. When an injury or death occurs, the employer will then be absolved of any responsibility under the Workers' Compensation Act or common law, since the landlord will be able to claim that the dangerous condition

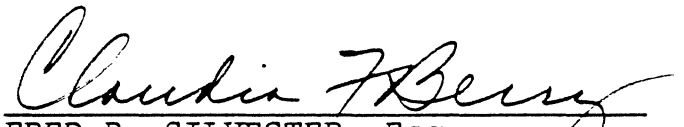
was created by the worker and, therefore, that the worker's own negligence, as a matter of law, bars recover. To permit summary judgment on this basis would reinstitute the arcane notion of contributory negligence which was rejected by this jurisdiction over a decade ago. See, Dixon v. Stewart, 658 P.2d 591, 598 (Utah 1982).

CONCLUSION

Defendant, as a landowner and as an individual with superior knowledge, had the duty to exercise reasonable care toward the decedent to inspect the porch on his rental property and adequately warn the decedent regarding the nature and extent of the risk involved in reconstructing the porch. Whether these duties were property discharged is a question of fact for the trier of fact in this case and should not have been disposed of on summary judgment. In addition, the facts of this case conclusively show that the defendant was the statutory employer of the decedent and not an independent contractor. The Court of Appeals' decision upholding the trial court's order granting

summary judgment in favor of the defendant should be reversed and the case should be remanded for trial.

DATED this 7th day of November, 1989.



FRED R. SILVESTER, Esq.
CHARLES P. SAMPSON, Esq.
CLAUDIA F. BERRY, Esq.
of and for
SUITTER AXLAND ARMSTRONG & HANSON
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellant was mailed, postage prepaid thereon, this 7th day of November, 1989, to:

AARON ALMA NELSON, Esq.
HANSON, NELSON, CHIPMAN & QUIGLEY
Counsel for Respondent
200 South Main Street, Suite 1300
Salt Lake City, Utah 84101

ALLAN L. LARSON, Esq.
SNOW, CHRISTENSEN & MARTINEAU
Co-Counsel for Respondent
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

Claudia F. Berry

(CBF14.2)

APPENDIX "A"

LABOR - INDUSTRIAL COMMISSION

WORKMEN'S COMPENSATION

Section 35-1-42

35-1-42. Employers enumerated and defined—Regularly employed—Independent contractors.—The following shall constitute employers subject to the provisions of this title:

(1) The state, and each county, city, town and school district therein.

(2) Every person, firm and private corporation, including every public utility, having in service one or more workmen or operatives regularly employed in the same business, or in or about the same establishment, under any contract of hire, express or implied, oral or written, except agricultural laborers and domestic servants; provided, that employers of agricultural laborers and domestic servants, shall have the right to come under the terms of this title by complying with the provisions thereof and the rules and regulations of the commission.

The term "regularly" as herein used shall include all employments in the usual course of the trade, business, profession or occupation of the employer, whether continuous throughout the year or for only a portion of the year.

Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and such work is a part or process in the trade or business of the employer, such contractor, and all persons employed by him, and all subcontractors under him, and all persons employed by any such subcontractors, shall be deemed, within the meaning of this section, employees of such original employer. Any person, firm or corporation engaged in the performance of work as an independent contractor shall be deemed an employer within the meaning of this section. The term "independent contractor," as herein used, is defined to be any person, association or corporation engaged in the performance of any work for another, who, while so engaged, is independent of the employer in all that pertains to the execution of the work, is not subject to the rule or control of the employer, is engaged only in the performance of a definite job or piece of work, and is subordinate to the employer only in effecting a result in accordance with the employer's design.